IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

Firm Madan Lal & Sons & Ors.

Vs.

Firm Sri Balaji Cotton Ginning Pressing & Oil Mill.

S.B.CR. MISC. PETITION NO.902/2007

Date of Order : September 11, 2007

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr.V.K.Aggarwal, for the petitioners.

BY THE COURT:

This criminal misc. petition under section 482 Cr.P.C. is directed against the order dt. 5.5.2006 passed by Additional Chief Judicial Magistrate, Raisinghnagar (for short `the trial court' hereinafter), whereby the trial court allowed the application filed by the non-petitioner under section 311 Cr.P.C. for recalling the witness and permitting him to appear and make a statement limited to the extent producing the document envelope returned unclaimed by the petitioners demanding the

cheque amount.

It is contended by the learned counsel for the petitioners that permitting the complainant-non-petitioner to file document would amount to filling up the lacunae in the complaint case.

From perusal of the order impugned, it appears that a cheque was issued by the petitioners in favour of complainant-non-petitioner and on being presented to the bank, returned unpaid and dishonoured on account of insufficient fund to the petitioners bank account. Thereafter, a notice was sent demanding the cheque amount within 15 days from the receipt of the notice by a registered post, the registered envelope returned unclaimed, which was to be filed along with the complaint as also the petitioners failed to pay the cheque amount within the statutory period and, therefore, the complainant-non-petitioner filed the complaint under section 138 of the Negotiable Instruments Act, 1881 (for short `the Act' hereinafter) within the statutory period. The said envelope was tagged with some other file of the complainant's counsel and at the time of filing the complaint as also making the statement, it could not be traced, however, subsequently, it was found with the counsel representing the complainant in the trial court and that being the material document essential for just decision of

the case. The complainant filed an application under section 311 Cr.P.C. seeking recalling of himself and making statement with regard to the envelope as also filing of the envelope. The trial court categorically held that the document in question is not only relevant but is essential for just decision of the case and allowed the application permitting the non-petitioner to appear and to make the statement limited to the extent of producing the document envelope returned unclaimed. In my view, it cannot be said that permitting he complainant-non-petitioner to file document would amount to filling up the lacunae in the complaint case. This controversy came to be decided by the Hon'ble Supreme Court in Rajendra Prasad Vs. Narcotics Cell through its Officer-in-charge, New Delhi, AIR 1999 SC 2292.

In Rajendra Prasad's case (supra), while considering the provision of Section 311 of the Code, the Hon'ble Apex Court held that criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guided and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case. It was further held by Their

Lordships that conventional concept is that Court should not permit lacuna in prosecution evidence to be filled up. But, then what is meant by lacuna in a prosecution case has to be understood before deciding the case. A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proned. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution cas.e The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

Thus, it cannot be said that the order impugned would result in serious miscarriage of justice or abuse of process of any Court. Nothing has been pointed out as to how the order impugned would prejudice the petitioners. It will always be open for the petitioners to cross-examine the witness when makes the statement before the trial court. In this view of the matter, I do not find any merit in this petition.

Consequently, the petition is dismissed.

[H.R.PANWAR],J.

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